(2)

No. 06-1080

Supreme Court, U.S.
FILED
MAY 10 2007
OFFICE OF THE CLERK

In The Supreme Court of the United States

CHAD PATRICK O'HANDLEY

Petitioner-Appellant,

v.

GENE M. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

Laurence D. Bragg
Counsel of Record
GOSS & FENTRESS
735 Newton Road
Suite 100
Norfolk, VA 23502
(757) 466-1095

Counsel for Petitioner

THE LEX GROUP^{DC} • 1750 K Street N.W. • Suite 475 • Washington, DC 20006
(202) 955-0001 • (800) 815-3791 • Fax: (202) 955-0022 • www.thelexgroupdc.com

QUESTIONS PRESENTED

I. Was the petitioner's sixth amendment right to counsel violated when trial counsel failed to investigate evidence, call critical witnesses, or adequately prepare for cross examination and sentencing?

II. Did the lower courts abuse their discretion by dismissing this habeas corpus petition without ordering an evidentiary hearing on allegations of ineffective assistance of trial counsel?

III. Does the statute of limitations apply to this case, where the Petitioner asserts that he is actually innocent of the crimes for which he has been convicted?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. THE COURT SHOULD REHEAR AND GRANT THE PETITIONER'S REQUEST FOR *CERTIORARI* BECAUSE THE INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES THE PETITIONER SUBMITS TO THE COURT ARE SUPPORTED BY STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984) 1

II. THE LOWER COURTS ABUSED THEIR DISCRETION AND COMMITTED ERROR BY DISMISSING THIS HABEAS CORPUS PETITION WITHOUT ORDERING AN EVIDENTIARY HEARING ON ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL 6

III. THE STATUTE OF LIMITATIONS DOES NOT APPLY TO THIS CASE BECAUSE THE PETITIONER ASSERTS THAT HE IS ACTUALLY INNOCENT OF THE CRIMES FOR WHICH HE HAS BEEN CONVICTED 8

CONCLUSION 10

CERTIFICATE PURSUANT TO SUP. CT. RULE 44

TABLE OF AUTHORITIES

Page

Cases

Boyde v. California,
494 U.S. 370 (1990) 5

Engle v. Isaac,
456 U.S. 107, 102 S. Ct. 1558,
71 L. Ed. 2d 783 (1982) 9

Henry v. Mississippi,
379 U.S. 443 (1965) 9

Marzullo v. Maryland,
561 F.2d 540 (4th Cir. 1977) 6

Morris v. California,
966 F.2d 448 (9th Cir. 1991) 9, 10

Murray v. Carrier,
477 U.S. 478, 106 S. Ct. 2678,
91 L. Ed. 2d 397 (1986) 9-10

Murray v. Griffith,
243 Va. 384,416 S.E.2d 219 (1992) 6

Sallie v. North Carolina,
587 F.2d 636 (4th Cir. 1978) 4, 6

Sawyer v. Whitley,
505 U.S. 333 (1992) 8

Schlup v. Delo,
513 U.S. 298 (1995) 8

Sena v. New Mexico State Prison,
109 F.3d 652 (10th Cir. 1997) 9

Smart v. Scully,
787 F.2d 816 (2d Cir. 1986) 9

Smith v. Phillips,
455 U.S. 209 (1982).....7

Sneed v. Smith,
670 F.2d 1348 (4th Cir. 1982) 6, 7

Strickland v. Washington,
466 U.S. 668 (1984).....1, 2, 5, 6

United States v. Burkley,
511 F.2d 47 (4th Cir. 1975) 5

United States v. Mandello,
426 F.2d 1021 (4th Cir. 1970) 7

Wainwright v. Sykes,
433 U.S. 72, 97 S. Ct. 2497,
53 L. Ed. 2d 594 (1977).....9

(Terry) Williams v. Taylor,
529 U.S. 362 (2000).....5, 7

Yeatts v. Murray,
249 Va. 285, 455 S.E.2d 18 (1995).....7

Statute

VA. CODE ANN. §§ 8.01-654 7

INTRODUCTION

This Petition for Writ of Certiorari has merit.

The Petitioner received a jury trial on the charges of murder and robbery of Shawn Mabry, which was tried on February 5 and 6 of 2001. At trial, the Petitioner's defense was that he acted in defense of his infant son, Noah O'Handley; and, the Petitioner asserted that he never robbed Mabry.

I. THE COURT SHOULD REHEAR AND GRANT THE PETITIONER'S REQUEST FOR *CERTIORARI* BECAUSE THE INEFFECTIVE ASSISTANCE OF COUNSEL ISSUES THE PETITIONER SUBMITS TO THE COURT ARE SUPPORTED BY STRICKLAND V. WASHINGTON, 466 U.S. 668 (1984).

Where a Petitioner's trial counsel failed to present favorable witness testimony and evidence, failed to investigate the case, failed to object to improper evidence, and failed to seek timely disclosure of discovery information, these circumstances (both individually and as a whole) constituted ineffective assistance of counsel which so prejudiced the Petitioner's case that these errors created a "reasonable probability" the result of the trial would have been different. Moreover, ineffective assistance of counsel issues presented in this case affect all trial and appellate courts and potentially all defendants facing criminal charges.

The evidence is uncontested that when the events occurred inside the Petitioner's home (at 210 Point Comfort in Hampton) which caused Mabry's death, there were only four (4) people present: the Petitioner, his infant son Noah, Mabry, and Jon Wolford. Noah was too young to comprehend the events or testify; and, Mabry is

dead. Therefore, only the Petitioner and Wolford were able to testify. While, the Petitioner testified, Wolford was never called to testify, nor was any explanation given in the record during the trial to the judge or jury as to why he was not called.

Throughout the two (2) day jury trial, it was evident that the jury verdict, although able to be supported by the evidence produced at trial, was not a conclusion reached with overwhelming record support. Strickland v. Washington, 466 U.S. 668 (1984). There was no evidence of any incriminating statements made by the Petitioner to the police.

The Petitioner's trial counsel was timely provided with four (4) statements made by Jon M. Wolford to the police:

1) Statement dated April 1, 2000 (See: Exhibit #6);
2) Statement dated April 2, 2000 (See: Exhibit #7);
3) Incident Report of Hampton Police Patrol Officer Robert McCarthy regarding statements made April 3, 2000 (See: Exhibit #8); and
4) Written statement (undated) which appears to state: "Shawn was at the house and drugs was involved . . . Shawn threatened to kill the baby" (See: Exhibit #9).

Each of Wolford's four (4) statements, and certainly all of them when considered together, supports the Petitioner's theory of innocence in this case by helping to show that Noah was threatened with a knife by Mabry, that the Petitioner acted in defense of his son, that Wolford delivered at least one blow to Mabry's head

with the ax (after which Mabry fell to the floor and did not move any more), and that no robbery of Mabry was contemplated or committed. Unfortunately for the Petitioner, neither Wolford nor any of his statements to the police were offered as evidence in this trial, nor was any explanation given to the jury as to why the defense did not introduce this evidence. There is no reference in the record or information provided to the Petitioner's present counsel that his trial counsel attempted to meet with Wolford to go over his testimony or otherwise see if Wolford would be able to testify.

Next, the Petitioner's trial counsel failed to use DNA evidence that would have supported the Petitioner's argument. Certificate of Analysis FS Lab # T00-3252, dated October 16, 2000, together with the Case Supplemental Report regarding evidence collection done on March 31, 2000, confirm that a typed letter found inside the residence at 210 Point Comfort (from the northeast bedroom floor) had blood on it from both Noah O'Handley and Mabry. (See: Exhibits #11 and #13, respectively) Specifically, DNA obtained from the letter (designated as "Item 15" in the Certificate) is consistent with a mixture of DNA profiles from Noah O'Handley and Mabry. (Exhibit #12 confirmed the fluid was blood from which the DNA profiles we extracted.) Neither the Certificates dated August 1, 2000 or October 16, 2000, nor the Case Supplemental Reports of March 31, 2000 or April 18, 2000, were moved into evidence or presented to the jury. The contents of the Certificate dated October 16, 2000 is significant because it supports the Petitioner's defense in two ways. First, it shows that, at some point, Noah was injured seriously enough to cause him to bleed. Second, the presence of Noah's blood with Mabry's blood strongly infers that Noah and Mabry were injured at, or close to, the same time and place.

Throughout the Petitioner's defense at trial, there was no physical evidence introduced to show that Noah was injured as the Petitioner and his fiancée, Angela Wolford, stated. The only piece of evidence recovered at the scene showing Noah bled was the letter found on the floor of the Northeast bedroom. Thus, showing that Noah's and Mabry's blood was together on this letter is a crucial piece of physical evidence that supports the Petitioner's contention that he acted in defense of his infant son Noah, who was threatened and cut with a knife by Mabry. This piece of physical evidence alone may have raised a reasonable doubt of guilt on the murder and robbery charges; and, present counsel is unaware of any strategy which would have helped the Petitioner's cause by not introducing this evidence.

Also, the Petitioner's trial counsel did not contest the police's search of the residence at 210 Point Comfort in Hampton. Trial counsel never asked any questions in the record regarding the contents of the search warrant or how it was executed. Apparently, a copy of the search warrant was never provided to trial counsel when the Commonwealth gave him the other discovery materials; and, trial counsel made no specific request to be provided with a copy of the search warrant after not receiving a copy with the other discovery materials. So, there appears to be no investigation done by trial counsel to determine the validity of the search warrant. The failure of defense counsel to raise any objection to the use of evidence obtained from the search of a residence raises a serious problem. Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978). The Fourth Circuit Court of Appeals would think it standard practice that defense counsel investigate the circumstances of any search and raise all possible objections to the admission of evidence obtained from it. Id. A motion to suppress concerning all of these issues should have been made by trial counsel; and,

rulings thereon should have been determined by the trial court well in advance of trial.

Further, the Petitioner's trial counsel did not adequately and diligently prepare for the jury sentencing phase of trial in failing to discover the mitigating evidence the Petitioner's father would have made known to the jury. (See: Exhibit #22). Where a defendant is denied effective assistance of counsel at the sentencing phase of trial, the case can be remanded for resentencing. United States v. Burkley, 511 F.2d 47 (4th Cir. 1975). When a defendant is sentenced in the absence of effective assistance of counsel, his sentence must be vacated and reimposed in a proceeding in which any facts in mitigation of punishment may be freely and fully developed. Id. A defendant has a constitutionally protected right to provide mitigating evidence even though his trial counsel either failed to discover it or failed to offer it. (Terry) Williams v. Taylor, 529 U.S. 362 (2000). Where a defendant shows that counsel's performance is deficient in not discovering or offering mitigating evidence for sentencing, and that the deficient performance prejudiced the defendant, then the defendant is entitled to a resentencing hearing. Id.; Strickland v. Washington, 466 U.S. 668 (1984). Where the neglected mitigating evidence is the graphic description of the defendant's childhood, filled with abuse, that evidence might well have influenced the jury's appraisal of his moral culpability. (Terry) Williams v. Taylor, 529 U.S. at 398; See: Boyde v. California, 494 U.S. 370, 387 (1990). This type of mitigating evidence is consistent with the view that the defendant's violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation; therefore, this evidence may lower the jury's selection of penalty. (Terry) Williams v. Taylor, 529 U.S. at 398.

In addition, defense counsel failed to timely move the trial court for an order directing the Commonwealth to disclose discovery and inspection. The Petitioner's trial counsel sent the Petitioner's Motion for Discovery and Inspection to the Commonwealth and the trial court by FAX February 4, 2001, the day before trial. (See: Exhibit #23) Without the entry by the trial court of an Order directing the Commonwealth to provide the defense with discovery and exculpatory materials, the Commonwealth's compliance is strictly voluntary. The Petitioner's present counsel has no knowledge that any such Order was ever entered with the trial court, and is unable from the record or other information to determine when or if all discovery and exculpatory materials were received that the Petitioner was entitled to receive. Without the timely receipt of same by trial counsel, he would not be able to investigate, prepare, present, emphasize, or argue evidence critical for the defense at trial. Sneed v. Smith, 670 F.2d 1348 (4th Cir. 1982); Strickland v. Washington, 466 U.S. 668 (1984); Sallie v. North Carolina, 587 F.2d 636 (4th Cir. 1978); Murray v. Griffith, 243 Va. 384, 416 S.E.2d 219 (1992); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977). As such, if the Court is unable to grant the Writ for a new trial from the other issues heretofore espoused, then the Petitioner would request an evidentiary hearing to determine the facts bearing on this issue.

II. THE LOWER COURTS ABUSED THEIR DISCRETION AND COMMITTED ERROR BY DISMISSING THIS HABEAS CORPUS PETITION WITHOUT ORDERING AN EVIDENTIARY HEARING ON ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A Circuit Court and the Virginia Supreme Court each has the authority to order an evidentiary hearing in

a habeas corpus proceeding to determine whether probable cause exists to believe the petitioner is detained without lawful authority. Code of Virginia § 8.01-654. This authority extends to factual determinations regarding allegations of ineffective assistance of counsel. Yeatts v. Murray, 249 Va. 285, 455 S.E.2d 18 (1995); Sneed v. Smith, supra. The remedy for allegations of unfairness at trial is a hearing in which the petitioner has the opportunity to prove the allegations of unfairness. Smith v. Phillips, 455 U.S. 209 (1982); (Michael) Williams v. Taylor, supra. It is very difficult to determine whether it "conclusively appears" that a petitioner was provided with effective representation in the absence of an adequate evidentiary hearing. Sneed, supra; United States v. Mandello, 426 F.2d 1021 (4th Cir. 1970). The Fourth Circuit Court of Appeals has stressed the importance of trial counsel's *testimony* (not merely an affidavit) in determining whether the defendant had effective representation. Id.

On this issue, the Petitioner submits that, although the record is adequate to grant the Petition (because the trial record conclusively demonstrates the Petitioner did not have effective representation [Id.]), the record is inadequate to dismiss the Petition without a plenary hearing. However, if this Honorable Court is not inclined to grant this Petition without a hearing on any or all the grounds previously stated, then the Petitioner would request a hearing to resolve all necessary facts for a determination on the issue of effectiveness of counsel, including but not limited to the following:

1. The failure of trial counsel to contest the search of the residence at 210 Point Comfort (The evidence in the record is insufficient to establish the validity of the search.);

2. The failure of trial counsel to make use of Certificate of Analysis FS Lab #T00-3252, dated October 16,2000;
3. The failure of trial counsel to request examination of unidentified DNA found on the leather leash, car board box, and fire extinguisher (all located inside the residence at 210 Point Comfort) to determine if that DNA belonged to Noah O'Handley; and
4. How the discovery process was conducted in this case between the Commonwealth and the Petitioner's trial counsel.

III. THE STATUTE OF LIMITATIONS DOES NOT APPLY TO THIS CASE BECAUSE THE PETITIONER ASSERTS THAT HE IS ACTUALLY INNOCENT OF THE CRIMES FOR WHICH HE HAS BEEN CONVICTED.

Schlup v. Delo, 513 U.S. 298 (1995). Innocence of the crime is not limited to the case where the state has convicted the wrong person, but also includes the case where the state has the "right" person; but, he is not guilty of the particular crime with which he is charged. Id.; see also: Sawyer v. Whitley, 505 U.S. 333 (1992). But for the ineffective assistance of trial counsel, evidence would have been introduced at trial to show that either the Petitioner took action in defense of his infant son Noah O'Handley, or Jon Wolford was the person who murdered Shawn Mabry, or both. Either of these explanations, if accepted by a jury, would result in a finding of innocence for the offenses with which the Petitioner is charged.

The evidence in support of the Petitioner's actual innocence is listed in this Petition for Writ of Certiorari, to wit:

A) Failure to call Jon Wolford as a witness, or to present his statements as evidence;

B) Failure to introduce in evidence the Certificate of Analysis FS Lab #T00-3252, dated October 16, 2000, to show a letter at the scene of these offenses was found to have DNA (blood) from both Noah O'Handley and Shawn Mabry on it;

C) Failure to request examination of unidentified DNA (blood) evidence found on other items at the scene of these offenses, which would support the Petitioner's claim of actual innocence; and

D) Ineffectiveness of trial counsel regarding evidence and testimony introduced at trial.

Each of these pieces of evidence, and certainly all this evidence when combined, offers substantial proof of the Petitioner's actual innocence. Where a petitioner asserts that had he received effective assistance of counsel, he would have asserted facts that would have demonstrated his innocence, then that is a matter which should be remanded to the trial court for a determination whether the Petitioner's right to effective assistance of counsel could have changed the outcome and trial. Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991).

Further, under the circumstances of this Petition, application of the statute of limitations does not serve a legitimate purpose. See: Henry v. Mississippi, 379 U.S. 443, 447 (1965); see also: Smart v. Scully, 787 F.2d 816 (2d Cir. 1986); Sena v. New Mexico State Prison, 109 F.3d 652 (10th Cir. 1997). Under the circumstances of this Petition, application of the statute of limitations would create a fundamental miscarriage of justice. Wainwright v. Sykes, 433 U.S. 72, 91, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); Engle v. Isaac, 456 U.S. 107, 135, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); Murray v. Carrier, 477 U.S. 478,

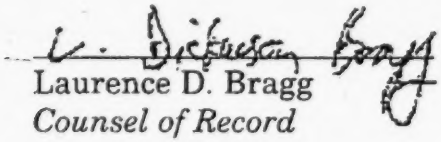
106 S. Ct. 2678, 91 L. Ed. 2d 397 (1986); Morris v. California, supra.

CONCLUSION

Based on the forgoing, the Petitioner requests this Court to remand this case for a new trial, or in the alternative for a new sentencing hearing, or in the alternative for a plenary hearing to determine whether the Petitioner had adequate representation during trial.

For the reasons given above, the Petition for a Writ of *Certiorari* should be granted.

Respectfully Submitted,



Laurence D. Bragg
Counsel of Record
Goss and Fentress
735 Newtown Road, Suite 100
Norfolk, Virginia 23502
(757) 466-1095 (Telephone)
(757) 461-4670 (Facsimile)

CERTIFICATE PURSUANT TO SUP. CT. RULE 44

I HEREBY CERTIFY THAT this Petition for Rehearing is restricted to substantial grounds not previously presented and is presented in good faith and not for delay.

L. Dickerson Bragg

Laurence D. Bragg